

EXHIBIT HHH

1 IN THE UNITED STATES DISTRICT COURT FOR THE
2 DISTRICT OF HAWAII

3 WAYNE BERRY, a Hawaii) CIVIL NO. 03-00385SOM-LEK
4 citizen,)
4 Plaintiff,) Honolulu, Hawaii
5 vs.) October 11, 2005
5) 10:57 a.m.
6 HAWAII EXPRESS SERVICE,) DEFENDANTS MARK DILLON,
7 Inc., a California) TERESA NOA, MELVIN PONCE,
7 corporation, et al.,) SONIA PURDY, JUSTIN
8 Defendants.) FUKUMOTO, ALFREDDA
8) WAIOLAMA & JACQUELINE RIO'S
9) MOTION FOR SUMMARY JUDGMENT
9) ON DAMAGES
0) DEFENDANT PCT'S MOTION
0) FOR PARTIAL SUMMARY
0) JUDGMENT ON DAMAGES

12 TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN OKI MOLLWAY,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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4 Official Court Reporter:

Cynthia Tando Fazio, RMR, CRR
United States District Court
P.O. Box 50131
Honolulu, Hawaii 96850

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1 in the record, a quote: You want to change my software, this
2 is what it's going to cost you. That's an issue of fact as to
3 whether what they're claiming, \$100, which is what they got
4 from somebody who's paying Mr. Berry a lot of money to use the
5 software legally.

6 THE COURT: Okay. First of all, if I entered judgment
7 against the defendants jointly and severally for any amount,
8 they are not the prevailing party. So I don't understand how
9 they're going to seek attorney's fees.

10 If you seek attorney's fees, then even if you get an
11 award of attorney's fees it's going to be reasonable attorney's
12 fees. And if your award is, for example, \$30,000, I don't
13 know, you're going to have a great time establishing that, you
14 know, half a million dollars is a reasonable attorney's fee for
15 a \$30,000 award. I mean I think that's a pretty tough row to
16 hoe.

17 Now, you can take me up on appeal. If I get reversed,
18 you come back down, you ultimately win a million dollars.
19 Well, obviously you're going to be in a different posture then
20 and, you know, no doubt your fees will stretch back even to
21 these proceedings that have preceded today.

22 I'm not saying I'm going to rule yet, but I'm just
23 trying to understand how the process will unfold as we go on
24 depending on how I rule. And, you know, some of the things
25 that you just said do not seem to me to follow logically from

1 your concern that I will grant their motion if the ultimate
2 order is that your damages are either 16-8 or 30,000. I don't
3 see this parade of horribles on attorney's fees frankly.

4 MR. HOGAN: Well, I've been through this once before
5 on the same issue of election right and during a trial, Your
6 Honor, and the case law is very clear that the simple fact of
7 election and the diminished amount that you get should not
8 be -- I can't remember the Ninth Circuit case, but the court
9 has spoken as saying that that is not relevant. It's --
10 copyright is a special place and because of difficulty in
11 damages and whatnot that the courts have generally looked at
12 this not as a sort of a pro rata or percentage kind of thing
13 but basically look at what the case was about and --

14 THE COURT: Okay. I --

15 MR. HOGAN: So that's why --

16 THE COURT: I'll grant you that. I mean I'll grant
17 you that in most intellectual property cases the money damages
18 do not fully reflect the value of a judgment that a plaintiff
19 obtains and that the more valuable portion of the judgment is
20 the injunction.

21 And so I agree with you that the money damages that
22 somebody obtains may be, you know, far outstripped by the
23 attorney's fees that were spent in the course of getting a very
24 valuable injunction. But there isn't an injunction here
25 because I found that they aren't using this -- this program

1 anymore and haven't been for sometime. So -- so that the
2 recover -- the value of any judgment you get is going to be
3 your money damages and that's -- my guess is that if we look at
4 these copyright cases that you're referring to in the Ninth
5 Circuit, that there was an injunction involved of some value
6 and that is what may lead a court to enter an attorney's fee
7 order that is many times -- many multiples of the money
8 judgment award. But that's not what we have here.

9 MR. HOGAN: Well, Your Honor --

10 THE COURT: You know, there's not an attorney fee
11 motion in front of me. I'm just -- I'm just saying that this
12 parade of horribles is not scaring me too much even though you
13 tried it out.

14 MR. HOGAN: Your Honor, as to the injunction they
15 still got copies of Mr. Berry's work. He's -- he's entitled to
16 an order of destruction and return. That's -- that's -- that's
17 still live in this case. There's been no termination of that
18 possession. There's no right to see and has to possess his
19 works. Perhaps if you want to keep them in an attorney's lock
20 box for litigation purposes, that's what the courts earlier
21 ruled. But CNS was delivered multiple copies of the work and
22 somebody has to deal with that. I don't know what will -- what
23 it'll do, it'll just engender more litigation.

24 THE COURT: Okay. As I understand it, the copies they
25 have, have been retained for litigation purposes, not for use.

1 COURT REPORTER'S CERTIFICATE

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3 I, CYNTHIA TANDO FAZIO, Official Court Reporter,
4 United States District Court, District of Hawaii, Honolulu,
5 Hawaii, do hereby certify that the foregoing pages numbered 1
6 through 47 is a correct transcript of the proceedings had in
7 connection with the above-entitled matter.

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DATED at Honolulu, Hawaii, November 14, 2005.

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CYNTHIA TANDO FAZIO, RMR, CRR